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9 **UNITED STATES DISTRICT COURT**  
10 **CENTRAL DISTRICT OF CALIFORNIA**  
11

12 SIMONE HILL,

13 Plaintiff,

14 v.

15 NATIONAL RAILROAD PASSENGER  
16 CORPORATION, dba AMTRAK, and  
DOES 1 through 10, Inclusive,

17 Defendants.  
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Case No.: 14-CV-0713 JGB (SPx)

**PLAINTIFF'S MEMORANDUM OF  
CONTENTIONS OF LAW AND  
FACT**

Final Pretrial Conference: 09/21/15  
Time: 11:00 a.m.  
Courtroom: 1

Trial Date: 10/06/15

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**PLAINTIFF'S MEMORANDUM OF CONTENTIONS OF LAW AND FACT**

1 Pursuant to L.R. 16-4, Plaintiff, Simone Hill ("Plaintiff" or "Hill") hereby submits  
2 her Memorandum of Contentions of Law and Fact.

3 **I. INTRODUCTION**

4 Simone Hill ("Plaintiff" or "Hill") was employed by National Railroad Passenger  
5 Corporation, dba "Amtrak" ("Amtrak") from 1996 through October 1, 2013. During her  
6 employment, Hill was an outstanding employee who consistently performed her job  
7 responsibilities in a satisfactory manner. During her employment, Hill also suffered from  
8 numerous physical disabilities that required reasonable accommodation. Specifically,  
9 Hill suffered from diabetes since childhood, which eventually led to amputation of her  
10 legs and nerve damage that has rendered her unable to control her bowel movements. She  
11 is confined to a wheelchair. She has had multiple organ transplants. She is required to  
12 ingest approximately 13 medications (22 pills) a day because of her various physical  
13 conditions. In 2012, Hill suffered a stroke impairing her short term memory.

14 On November 14, 2011, Hill filed suit against Amtrak for failure to accommodate  
15 her disabilities due to Amtrak's refusal to allow Hill to work from home. The lawsuit  
16 was settled in April, 2013. Thereafter, Hill attempted to resume working from home for  
17 Amtrak as a Reservations Sales Agent.

18 As is described below and will be proven at trial, upon Hill's return to work in  
19 April, 2013, Amtrak unlawfully withdrew reasonable accommodations that had been in  
20 effect for several years; deprived Hill of further reasonable accommodations; refused to  
21 engage in the timely, good faith interactive process regarding the accommodation of her  
22 disabilities; subjected Hill to unwarranted disciplinary proceedings regarding absences  
23 related to and necessitated by her disabilities; and constructively terminated Hill's  
24 employment.

25 ///

26 ///

1 **II. THE PARTIES' CLAIMS AND DEFENSES [L.R. 16-4.1]**

2 This is a civil action concerning violations of several provisions of the California  
3 Fair Employment and Housing Act ("FEHA") by Amtrak related to Hill's employment  
4 with Amtrak and separation therefrom. Jurisdiction is asserted under 28 U.S.C. §  
5 1332(a).

6 **A. HILL's CLAIMS AND ELEMENTS**

7 **1. Summary of Hill's Claims [L.R. 16-4.1(a), (b)]**

8 The First Amended Complaint alleges five counts for relief: 1) Disability  
9 Discrimination in Violation of FEHA; 2) Failure to Reasonably Accommodate in  
10 Violation of FEHA; 3) Failure to Engage in the Interactive Process in Violation of  
11 FEHA; 4) Retaliation in Violation of FEHA; and 5) Wrongful Constructive Termination  
12 in Violation of Public Policy. Hill seeks economic and non-economic compensatory  
13 damages, punitive damages, statutory attorneys' fees, and costs of suit.

14 **a) Claim 1: Disability Discrimination in Violation of FEHA.**

15 Summary: Amtrak violated *Cal. Gov't. C. § 12940(a)*.

16 Elements: Hill has the burden of proving that: (1) Amtrak knew that Hill had a  
17 physical disability or regarded Hill as having a physical disability; (2) That Hill was able  
18 to perform the essential job duties of her position with reasonable accommodation for  
19 her physical disabilities (was a qualified person); (3) That Amtrak subjected Simone Hill  
20 to an adverse employment action; (4) That Hill's physical condition or perceived physical  
21 condition was a substantial motivating reason for Amtrak's decision to subject Hill to  
22 adverse employment action; (5) That Hill was harmed; and (6) That Amtrak's conduct  
23 was a substantial factor in causing Hill's harm.

24 Conduct resulting from a disability is part of the disability and not a basis for  
25 adverse employment action.

1        Source:     California Civil Jury Instructions (CACI) No. 2540; *Tysinger v.*  
2        *Police Dep't of Zanesville*, 463 F.3d 569, 573 (6th Cir. Ohio 2006); *Cicero v. Borg-*  
3        *Warner Auto., Inc.*, 280 F.3d 579, 585 (6th Cir. Mich. 2002); *Gambini v. Total Renal*  
4        *Care, Inc.* (9<sup>th</sup> Cir. 2007) 486 F.3d 1087, 1093; *Humphrey v. Memorial Hosps. Assn.* (9<sup>th</sup>  
5        Cir. 2001) 239 F. 3d 1128, 1139-1140; *Borkowski v. Valley Cent. School Dist.* (2<sup>nd</sup> Cir.  
6        1995) 63 F. 3d 131, 143.

7        **b)     Claim 2: Failure to Reasonably Accommodate in Violation of**  
8        **FEHA.**

9        Summary:     Amtrak violated *Cal. Gov't. C. § 12940(m)*.

10       Elements:     Hill has the burden of proving that: (1) Hill had a physical condition  
11       that limited her ability to recall or retain information, to work outside of her home, and  
12       to refrain from periodic absences necessitated by her disability; (2) Amtrak knew of  
13       Hill's physical condition that limited her ability to recall or retain information, to work  
14       outside of her home, and to refrain from periodic absences necessitated by her disability;  
15       (3) Hill was able to perform her essential job duties with reasonable accommodation for  
16       her physical condition (qualified person); (4) Amtrak failed to provide reasonable  
17       accommodation for Hill's physical condition; (5) Hill was harmed; and (6) Amtrak's  
18       failure to provide reasonable accommodation was a substantial factor in causing Hill's  
19       harm.

20       Source:       CACI No. 2541.

21       **c)     Claim 3: Failure to Engage in the Interactive Process in**  
22       **Violation of FEHA.**

23       Summary:     Amtrak violated *Cal. Gov't. C. § 12940(n)*.

24       Elements:     Hill has the burden of proving that: (1) Hill had a physical condition  
25       that was known to Amtrak or that Amtrak regarded Simone Hill as having a physical  
26       condition; (2) Hill requested that Amtrak make reasonable accommodation for her

1 physical condition so that she would be able to perform the essential job functions or that  
2 Amtrak otherwise became aware of the need for an accommodation through a third party  
3 or by observation; (3) Hill was willing to participate in an interactive process to  
4 determine whether reasonable accommodation could be made so that she would be able  
5 to perform the essential job requirements; (4) Amtrak failed to participate in a timely  
6 good faith interactive process with Hill to determine whether reasonable accommodation  
7 could be made; (5) Hill was harmed; and (6) Amtrak 's failure to engage in a good-faith  
8 interactive process was a substantial factor in causing Hill's harm.

9 Source: CACI 2542; Govt. Code § 12940(n); Cal. Code Regs. tit. 2, §  
10 11069.9(b)(2); *Prilliman v. United Airlines, Inc.* (1997) 53 Cal.App.4th 935, 954.

11 **d) Claim 4: Retaliation in Violation of the FEHA.**

12 Summary: Amtrak violated *Cal. Gov't. C.* § 12940(h).

13 Elements: Hill has the burden of proving that: (1) Hill filed a previous lawsuit  
14 alleging failure to reasonably accommodate her disabilities or Hill requested reasonable  
15 accommodation for her disabilities or Hill protested what she reasonably and in good  
16 faith believed to be Amtrak's failure to provide reasonable accommodation for her  
17 disabilities; (2) Amtrak subjected Hill to adverse employment action;<sup>1</sup> (3) Hill's filing  
18 of a previous lawsuit alleging failure to reasonably accommodate or her request for  
19 reasonable accommodation for her disabilities or her protest to what she reasonably and  
20 in good faith believed to be Amtrak's failure to provide reasonable accommodation for  
21 her disabilities was a substantial motivating reason for Amtrak's decision to subject Hill  
22 to adverse employment action; (4) Hill was harmed; and (5) Amtrak's conduct was a  
23 substantial factor in causing Hill's harm.

24  
25 <sup>1</sup>"Adverse Employment Action" is defined as conduct by the employer that materially affects the  
26 terms, conditions or privileges of the employee's employment in some negative way. *Yanowitz v.*  
*L.Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1054.

1        Source: CACI No. 2505; *Yanowitz v. L.Oreal USA, Inc.* (2005) 36 Cal. 4th 1028,  
2        1054; *Horsford vs. Board of Trustees of California State University* (2005) 132 Cal App  
3        4th 359, 374.

4        **e)      Claim 5: Constructive Termination in Violation of Public Policy.**

5        Summary: Amtrak constructively terminated Hill's employment in Violation of  
6        Public Policy.

7        Elements: Hill has the burden of proving: (1) That Hill was subjected to working  
8        conditions at Amtrak that violated public policy, in that Hill was treated intolerably<sup>2</sup>  
9        because of her disabilities or in retaliation for filing a prior lawsuit for failure to  
10       reasonably accommodate or for requesting reasonable accommodation for her disabilities  
11       or in retaliation for protesting what she reasonably and in good faith believed to be  
12       Amtrak's failure to provide reasonable accommodation for her disabilities; (2) That  
13       Amtrak intentionally created or knowingly permitted these working conditions; (3) That  
14       these working conditions were so intolerable that a reasonable person in Hill's position  
15       would have had no reasonable alternative except to resign; (4) That Hill resigned  
16       because of these working conditions; (5) That Hill was harmed; and (6) That the working  
17       conditions were a substantial factor in causing Hill's harm.

18       Source: CACI No. 2432; *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238,  
19       1244-1245 ; *Colores v. Bd. of Trustees*, 105 Cal. App. 4th 1293, 1314; see *Lowe v.*  
20       *Indep. Sch. Dist. No. 1*, 363 Fed. Appx. 548, 555 (10th Cir. Okla. 2010).

21       **f)      Prayer for Relief – Compensatory damages:**

22       Summary: Hill seeks past and future compensatory damages (economic and non-  
23       economic) for Amtrak's violations of the FEHA and unlawful actions resulting in her  
24       constructive termination in violation of public policy.

25       <sup>2</sup>To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to  
26       a reasonable person in Simone Hill's position. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238,  
1244-1245 ; *Colores v. Bd. of Trustees*, 105 Cal. App. 4th 1293, 1314.

1        Elements: Hill is entitled to past loss of earnings and benefits up through time  
2 of trial, future loss of earnings and benefits up through retirement (age 67), and past and  
3 future mental suffering, loss of enjoyment of life, inconvenience, grief, anxiety,  
4 humiliation, and emotional distress.

5        Source: CACI Nos. 3902, 3903, 3903C, 3905, and 3905A; *Horsford v. Board of*  
6 *Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 388 (Backpay represents the  
7 amount of compensation plaintiff would have earned but for the discrimination,  
8 measured from the time of the adverse action until trial); See *EEOC v. Hacienda Hotel*  
9 (9th Cir. 1989) 881 F2d 1504, 1518 (Backpay generally includes not only lost wages or  
10 salary but also other benefits lost during the period in question); *Horsford, supra* at 388  
11 (Front pay may be awarded for the period between judgment and reinstatement or in lieu  
12 of reinstatement. It may also be based on a wage differential over the course of plaintiff's  
13 working life); *Commodore Home Systems, Inc. v. Sup.Ct. (Brown)* (1982) 32 C3d 211,  
14 221, 185 CR 270, 276 (all relief generally available in noncontractual actions may be  
15 awarded in civil action under FEHA); See Cal. Gov't. C. § 12970; *Bihun v. AT & T*  
16 *Information Systems, Inc.* (1993) 13 CA4th 976, 995, 997 (past and future emotional  
17 distress damages may be awarded under FEHA).

18        **g) Prayer for Relief – Punitive damages:**

19        Summary: Hill seeks punitive damages in an amount according to proof at trial  
20 for Amtrak's malicious, oppressive and/or fraudulent violations of the FEHA and  
21 constructive termination of Hill's employment in violation of public policy in conscious  
22 disregard of Hill's rights.

23        Source: CACI No. 3945; Civ.C. § 3294(a), (b); *Commodore Home Systems, Inc.*  
24 *v. Sup.Ct. (Brown)* (1982) 32 C3d 211, 221 (specifically authorizing recovery of punitive  
25 damages in civil FEHA actions); *Cloud v. Casey* (1999) 76 CA4th 895, 911–913; *Weeks*  
26 *v. Baker & McKenzie* (1998) 63 CA4th 1128, 1148–1151; *White v. Ultramar, Inc.* (1999)



1 21 C4th 563, 577.

2 **2. Key Evidence in Support of Hill's Claims [L.R. 16-4.1(c)]**

3 **a) Claim 1: Disability Discrimination in Violation of FEHA.**

4 Hill will introduce the following categories of evidence establishing that Amtrak  
5 discriminated against Hill because of her disabilities:

6 ● *Disability:* Hill is a disabled person, in that she has physiological  
7 conditions affecting several body systems that limit the major life activities  
8 of walking, utilizing short-term memory, defecating, eating, and working.  
9 *Cal. Gov't. C. § 12926(m).* She suffered from diabetes since childhood, which  
10 eventually led to amputation of her legs and nerve damage that  
11 has rendered her unable to control her bowel movements. She is confined  
12 to a wheelchair. She has had multiple organ transplants. She is required to ingest  
13 approximately 13 medications (22 pills) a day because of her various physical  
14 conditions. In 2012, Hill suffered a stroke that has impaired her short-term  
15 memory. These assertions of fact will be supported by the testimony of Hill,  
16 her treating physicians (John Robertson, M.D, Galen Huang, M.D., and Ronald  
17 Offenstein, Ph.D.), and Amtrak's expert witness, Annette Swain, Ph.D.

18 ● *Awareness of Disability:* Managers and managing agents employed by  
19 Amtrak were aware of Hill's disability and regarded her as disabled. Dianne Pitts,  
20 Rita Crozier, Aku Omanike, and Denyse Nelson -Burney were each aware of and  
21 believed that Hill was a disabled person who needed to work from home, was  
22 missing both of her legs, was confined to a wheelchair, and suffered  
23 from a stroke impairing her short-term memory.

24 These assertions of fact will be supported by the testimony of Hill, Pitts, Crozier,  
25 Omanike, and Nelson-Burney, as well as emails and Amtrak internally-generated  
26 documents concerning Hill's disabilities and limitations related thereto.

1       ●     *Qualified Person:* Between April 24, 2013 and October 1, 2013, Hill was  
2 a qualified person with a disability, in that she was able to perform the essential  
3 functions of her job with accommodations. Up to the date of Hill's constructive  
4 termination, her job performance was satisfactory and Amtrak had no stated plans  
5 to terminate her employment.

6 These assertions of fact will be supported by the testimony of Hill, Omanike,  
7 Pitts, Robertson, Offenstein, and Swain, as well as emails from Omanike to Hill  
8 regarding Hill's job performance.

9       ●     *Adverse Employment Action and Substantial Motivating Reason:* Shortly  
10 after Pitts came to Hill's home in late April, 2013, she wrote Hill a letter  
11 discussing her accommodations. Callously referring to Hill's disability-  
12 necessitated use of leave as "at random," Pitts went on to state that she had  
13 spoken with Amtrak's ADA panel, and that the only accommodation in place  
14 for her disabilities was the ability to work from home. In other words, Hill no  
15 longer had any accommodations to take time "off phone" to tend to her medical  
16 needs or to take full day absences as necessitated by her disabilities. The letter  
17 further invited Hill to reinvent the wheel by going through the same onerous  
18 and bureaucratic accommodations process she had spent years prior doing to  
19 obtain these accommodations in the first instance. Hill was stunned, as no one  
20 had informed her that she had lost these accommodations upon her return to  
21 work. Hill was therefore forced to spend the first month of her difficult  
22 transition back to work fighting for accommodations that had already been  
23 granted to her. During this time, Hill was informed that she was accruing  
24 "occurrences" for full days and off-phone time she was spending related to her  
25 disabilities. Hill first called Yvette Perkins, who was in charge of ADA  
26 recordkeeping at the Riverside Call Center when Hill had last worked in 2012.

1 Perkins informed Hill that all of her previously granted accommodations  
2 should be in place, and that the only person who can revoke these is her doctor.  
3 Hill next drafted an email to Amtrak's Medical Services requesting that her  
4 accommodations be reinstated.

5 One month later, on May 24, 2013, ADA Panel member Karen Broadwater replied  
6 to Hill informing her that, contrary to Pitts's April 24, 2013 letter, Hill's  
7 prior accommodations were all in place and had not been revoked.  
8 However, on August 1, 2013, Broadwater clarified her remarks by stating to  
9 Hill in an email that any time spent "off phone" to tend to her disabilities would  
10 now be unpaid. This resulted in the revoking of Hill's previous accommodations,  
11 in effect since 1998, that permitted Hill to be paid for time "off phone" for medical  
12 needs that lasted no more than 15 minutes.

13 These assertions of fact will be supported by the testimony of Hill, Pitts,  
14 Perkins, Crozier, and Broadwater, as well as emails and Amtrak internally-  
15 generated documents concerning Hill's disabilities and accommodations related  
16 thereto.

17 ● *Adverse Employment Action and Substantial Motivating Reason:* While  
18 Hill worked from home, she and her Supervisor Omanike were  
19 required to communicate regarding various routine issues. Due to the  
20 fact that Hill did not work in the office, Omanike did not have the luxury of  
21 providing Hill with documents in the same manner that she could with other  
22 agents she supervised. Omanike therefore sent documents to Hill  
23 in Excel format to review and discuss. Omanike informed Pitts that it was  
24 essentially for purposes of communication, and to ensure that Hill received the  
25 same benefits of communication as other sales agents, that she have Excel on her  
26 computer. Despite this, according to Omanike, Pitts intentionally chose to

1 uninstall Excel from Hill's computer. This deprived Hill of the ability to  
2 effectively communicate with her supervisor regarding important documents.  
3 Despite Omanike's pleas to Pitts to reinstall the program, Pitts did not do so for  
4 approximately two months.

5 These assertions of fact will be supported by the testimony of Hill and Omanike,  
6 as well as emails related to the need for accommodation.

7 ● *Adverse Employment Action and Substantial Motivating Reason:* During  
8 this time period, it also became clear to Amtrak through observation that Hill  
9 was having difficulties retaining company policies, and that she could benefit  
10 from more training. On July 5, 2013, Crozier wrote a letter to Pitts stating:  
11 "Apparently [Hill] is still struggling with policies and RailRes functions which  
12 may be a result of her stroke." In response, Pitts only proposed more training  
13 at the Riverside Call Center, a location Pitts already knew that Hill was  
14 precluded from working due to her accommodations. Omanike also asked Pitts  
15 to provide Hill with more training. Pitts refused however, stating that Hill had  
16 received "the same training anybody else coming back to work would receive."  
17 These assertions of fact will be supported by the testimony of Hill, Pitts,  
18 Omanike, and Crozier, as well as emails and Amtrak internally-generated  
19 documents concerning Hill's disabilities and need for accommodations related  
20 thereto.

21 ● *Adverse Employment Action and Substantial Motivating Reason:* Once  
22 Hill returned to work, she continued to periodically require absences  
23 related to her disabilities. On those occasions, she did what she had  
24 always done in the past without incident. She called the automated call number  
25 and reported her absences as either "Sick-Paid," "Sick-Unpaid" or "ADA"  
26 interchangeably. All of these absences were related to her disabilities.

1 These assertions of fact will be supported by the testimony of Hill, as well as  
2 emails and Amtrak internally-generated documents concerning Hill's disabilities  
3 and accommodations related thereto.

4 ● *Adverse Employment Action and Substantial Motivating Reason:* On July  
5 18, 2013, Hill was served at her home during work hours with a Notice of  
6 Intent to Impose Discipline ("Notice") for violating Amtrak's National  
7 Attendance Policy when she took "Unpaid-Sick" absences for the days of July 13,  
8 2013 and July 14, 2013. These absences were in fact necessitated by  
9 her disabilities, which caused Hill to miss July 10, 2013 through July 14,  
10 2013. Hill's supervisor, Omanike was so concerned about her well being during  
11 this time that she sent an email to Hill inquiring as to her well-being.

12 These assertions of fact will be supported by the testimony of Hill, Pitts,  
13 Charlena Powell, Gerald Powell, Robertson, and Omanike, as well as emails and  
14 Amtrak internally-generated documents concerning Amtrak's disciplinary  
15 procedures and Hill being subject to discipline.

16 ● *Adverse Employment Action and Substantial Motivating Reason:* Hill's  
17 Notice of Intent to Impose Discipline stated that she was being charged  
18 with violating Amtrak's National Attendance Policy by being absent on July 13,  
19 2013 and July 14, 2013. Amtrak's National Attendance Policy states,  
20 in relevant part, that "[i]t addresses the performance of employees who do not  
21 meet minimum standards through counseling and, as a last resort, discipline."  
22 Amtrak's Policy for Handling Formal Discipline states, in relevant  
23 part, that "[f]or cases involving minor infractions and a clear service record,  
24 counseling is recommended to change employee behavior." Amtrak's Counseling  
25 and Discipline Guideline Summary states that "[e]xcept for serious infraction  
26 where discipline may be necessary, counseling should first be used to change

1 behavior.” Amtrak admitted that Hill had a clear service record in July of  
2 2013.

3 These assertions of fact will be supported by the testimony of Hill, Pitts,  
4 Nelson-Burney, Crozier, Sal Rodriguez, Gerald Powell, and Omanike, as well as  
5 emails and Amtrak internally-generated documents concerning Amtrak's  
6 disciplinary procedures and Hill being subject to discipline.

7 ● *Adverse Employment Action and Substantial Motivating Reason:* Despite  
8 the clear directives contained in Amtrak’s policies, Pitts chose to proceed  
9 straight to the “last resort” of pursuing discipline and bypass the recommended  
10 measures of counseling. Pitts chose to do so knowing the confusion  
11 that had resulted from her initial denial of Hill’s accommodations, the  
12 existence of Hill’s memory problems, and the fact that she failed to inform  
13 Hill of how she should report her absences without incurring occurrences.  
14 Pitts further chose to institute the most heavy-handed available response to Hill’s  
15 absences without attempting to ascertain from Hill whether the absences were  
16 necessitated by her disability and without speaking with Hill’s immediate  
17 supervisor, who was in fact unaware that Hill had been issued a Notice of Intent  
18 to Impose Discipline until Hill informed her of that fact. In sum, Pitts failed to  
19 follow Amtrak’s own policies in taking a measured and informed response to  
20 Hill’s supposed transgressions.

21 These assertions of fact will be supported by the testimony of Hill, Pitts,  
22 Nelson-Burney, Crozier, Rodriguez, and Omanike, as well as emails and  
23 Amtrak internally-generated documents concerning Amtrak's disciplinary  
24 procedures and Hill being subject to discipline.

25 ● *Adverse Employment Action and Substantial Motivating Reason:* Once  
26 an employee is issued a Notice of Intent to Impose Discipline, the

1 Transportation Communications Union ("Union") is notified of the charges. In  
2 this case, local chairman Sal Rodriguez was assigned to Hill's case. Rodriguez  
3 had known Hill for some time, was aware she was disabled, and was aware of  
4 her most recent battle to receive accommodations. Hill informed Rodriguez  
5 that her absences were related to her disabilities, and therefore were covered by  
6 her existing accommodations. Rodriguez therefore approached Pitts on  
7 multiple occasions and requested that the charges be withdrawn. According to  
8 Rodriguez, when charges are brought they are routinely withdrawn without  
9 further incident. Further, Pitts could have corrected any coding mishaps that  
10 were caused by Hill's adherence to procedures accepted in the past and her  
11 short-term memory problems. However, Pitts refused to withdraw the  
12 discipline, claiming that she going to treat Hill like "everybody else" and that  
13 Amtrak's legal counsel had directed her not to withdraw the discipline. As it  
14 turns out, the Notice of Intent to Impose Discipline was ratified by  
15 Nelson-Burney, the very Amtrak in-house attorney who oversaw  
16 the litigation of Hill's prior case. At the time Burney ratified the Notice, she  
17 was aware that Hill had suffered a stroke and had experienced memory  
18 problems.

19 These assertions of fact will be supported by the testimony of Hill, Pitts,  
20 Nelson-Burney, Offenstein, Robertson, and Rodriguez, as well as emails and  
21 Amtrak internally-generated documents concerning Amtrak's disciplinary  
22 procedures and Hill being subject to discipline.

23 ● *Adverse Employment Action and Substantial Motivating Reason:* The  
24 Notice of Intent Hearing took place on July 30, 2013. Hill and Sal Rodriguez  
25 participated, along with Amtrak's Charging Officer Mike Eisenberg.  
26 Eisenberg was supervised by and reported to Pitts. Before these hearings, it

1 was customary for Pitts and Eisenberg to discuss a plea or "Waiver" that would  
2 be offered to the employee. During the Notice of Intent Hearing, Hill informed  
3 Amtrak's Charging Officer Mike Eisenberg that her absences for which she  
4 was being charged were necessitated by her disabilities. Despite this  
5 knowledge, and despite the fact that Amtrak's own policies called for only  
6 counseling in these instances, Eisenberg informed Hill that he would only  
7 forego proceeding with a Formal Disciplinary Proceeding at the Riverside Call  
8 Center if Hill would agree to accept a written letter of reprimand admitting  
9 guilt that would be placed in her personnel file, along with a promise that she  
10 would have no more occurrences for nine months, lest she be subject to  
11 termination. Hill knew that her absences for which she was being charged were  
12 related to her disabilities. She therefore refused Eisenberg's offer.

13 These assertions of fact will be supported by the testimony of Hill, Pitts,  
14 Nelson-Burney, Eisenberg, and Rodriguez, as well as emails and Amtrak  
15 internally-generated documents concerning Amtrak's disciplinary procedures  
16 and Hill being subject to discipline.

17 ● *Adverse Employment Action and Substantial Motivating Reason:* As a  
18 result, on July 30, 2013 Amtrak delivered a Notice of Formal Investigation to  
19 her home. The Formal Investigation hearing was to take place on  
20 August 6, 2013 at the Riverside Call Center, in direct violation of her  
21 accommodation to work from home and contrary to what she physically could  
22 manage given her disabilities. In Eisenberg's and Pitt's zealously  
23 to prosecute, Eisenberg prepared scripts of questions and answers for  
24 witnesses (which included Pitts) to recite at the upcoming hearing. The  
25 scripts did not only predetermine Hill's guilt, they went further  
26 to characterize Hill's actions as knowing attempts to receive pay when she



1 was not entitled to it, a very serious charge. This was included despite  
2 the fact that the specific absences for which Hill was being charged were  
3 "Sick-Unpaid."

4 These assertions of fact will be supported by the testimony of Hill, Pitts,  
5 Rodriguez, and Eisenberg, as well as emails and Amtrak internally-generated  
6 documents concerning Amtrak's disciplinary procedures and Hill being  
7 subject to discipline.

8 ● *Harm:* On July 18, 2012, Hill's physician John Robertson, M.D.  
9 recommended that Hill go out on disability due to the stress Amtrak's  
10 treatment of her caused. However, having fought for years for the right to  
11 work with accommodation and viewing her job as the most meaningful and  
12 important component of her life, Hill wanted to give Amtrak more time to  
13 honor her needed accommodations. Simply put, Hill wanted to work.  
14 Regrettably, as this discipline campaign continued, Hill was becoming  
15 increasing frustrated. Her frustration quickly evolved into more frequent bouts  
16 of confusion, memory lapses, intense headache, numbness in her upper  
17 extremity, anxiety, sleeplessness, bowel upset, and crying spells.

18 These assertions of fact will be supported by the testimony of Hill, Omanike,  
19 Rodriguez, Offenstein, and Robertson, as well as emails and medical records  
20 concerning Hill's state of emotional and physical state.

21 ● *Adverse Employment Action and Substantial Motivating Reason:*  
22 As this aggressive disciplinary crusade was transpiring, Rodriguez passed along  
23 word of her situation to the Union official, Larry Jones. On August 21, 2013, the  
24 Union sent a letter signed by International President Robert Scardelletti and  
25 addressed to Amtrak's CEO Joseph Boardman addressing Hill's struggles. Hill  
26 was copied on the letter. The letter stated complaints of failure to accommodate

1 and retaliation, and urged CEO Boardman to “personally look into the matter and  
2 remedy it.” The letter was referred to Nelson-Burney for response, as she was the  
3 attorney who handled Hill’s recently-closed past litigation. Burney understood  
4 that the letter was alleging that Hill was being retaliated against. She further  
5 understood that California law required Amtrak to promptly investigate all  
6 complaints of retaliation, and was aware that it was Amtrak’s policy  
7 to do so. She also, however, took the letter as a “union rant” and a personal attack  
8 on her character, even though the letter made no mention of her personally. She  
9 further believed that the letter did not give rise to “anything to investigate,” and  
10 characterized the letter as “not of paramount importance.” She therefore waited  
11 until October 23, 2013 to draft a response. In the meantime, Hill operated under  
12 a temporary false sense of hope that her concerns would finally be addressed and  
13 disciplinary proceedings would be terminated. Burney eventually spoke to Pitts  
14 for no more than a half an hour, letting Pitts know that she would be responding  
15 to Scardelletti’s allegations that Hill had been treated horribly. Burney did not  
16 speak to anyone else at the Riverside Call Center about the letter. She  
17 notably failed to speak with Omanike about the letter. She also  
18 never spoke with Hill about the letter, never asked Hill about the  
19 nature of her absences for which she was being disciplined, and never advised  
20 Hill regarding the status of her “investigation.”

21 These assertions of fact will be supported by the testimony of Hill, Pitts,  
22 Nelson-Burney, Rodriguez, Omanike, and Scardelletti, as well as  
23 emails and Amtrak internally-generated documents concerning Amtrak’s  
24 investigation procedures and investigation into allegations of discrimination by  
25 Hill.

26 ● *Harm:* By September, 2013, two months had passed since Hill’s

1 disciplinary proceedings had been initiated, and weeks had passed without any  
2 response to Scardelletti's letter. In fact, the only communication Hill had  
3 from Amtrak regarding her accommodations were from Broadwater, who on  
4 August 1, 2013 revoked Hill's previous accommodation to be permitted to  
5 take up to 15 minutes of off phone time to tend to her disabilities with pay. Hill's  
6 physical symptoms were intensifying in an alarming fashion. On September 11,  
7 2012, Hill suffered another intense headache and numbness in her upper extremity.  
8 She saw Dr. Robertson, who told her that she needed to go on disability, as  
9 Amtrak's treatment of her had potentially put her in jeopardy of having another  
10 stroke. Having to choose between her livelihood and her life, on September 17,  
11 2013, Hill sent an email giving her notice of intent to resign. In the email, Hill  
12 wrote: "I do find that the same fight over accommodation is too heavy to bear  
13 (accommodations fought for and won, by yet refused), is all too much." Providing  
14 Amtrak with one final chance to address her accommodation issues, Hill made her  
15 resignation effective after two weeks of notice. However, Amtrak failed to  
16 contract Hill after receipt of her September 17, 2013 email regarding the contents  
17 of the email.

18 These assertions of fact will be supported by the testimony of Hill, Robertson,  
19 Nelson-Burney, and Offenstein. as well as emails, Amtrak internally-  
20 generated documents, and medical records concerning Hill's resignation and  
21 physical and emotional state.

22 ● *Substantial Motivating Reason:* All absences for which Hill was being  
23 subject to discipline were necessitated by and related to her disabilities.  
24 Furthermore, no one involved in the disciplinary process ever told Hill during her  
25 employment that she was being subject to discipline for entering in a "wrong  
26 code." Even if that were true, the ability to recall and enter specific codes

1 necessarily implicates Hill's short-term memory, which was impaired as a result  
2 of her stroke.

3 These assertions of fact will be supported by the testimony of Hill, Pitts,  
4 Nelson-Burney, Offenstein, Robertson, Eisenberg, and Rodriguez, as well as  
5 emails and Amtrak internally-generated documents concerning Amtrak's  
6 disciplinary procedures and Hill being subject to discipline.

7 **b) Claim 2: Failure to Reasonably Accommodate in Violation of**  
8 **FEHA.**

9 Hill will introduce the following categories of evidence establishing that  
10 Amtrak failed to reasonably accommodate Hill's disabilities:

11 ● Hill incorporates by reference and refers the court to the portions of  
12 Sections II(A)(2)(a) that are entitled *Disability, Awareness of Disability, Qualified*  
13 *Person*, and *Harm* as categories of evidence that establish those same elements of  
14 Hill's second cause of action for Failure to Reasonably Accommodate in Violation  
15 of FEHA.

16 ● *Failure to Reasonably Accommodate:* Hill requested that  
17 Amtrak make modifications to its attendance policy to allow her to perform  
18 the essential functions of her job, including terminating the existing  
19 unwarranted disciplinary action being brought against her. Amtrak refused to  
20 do so.

21 These assertions of fact will be supported by the testimony of Hill, Pitts,  
22 Omanike, Nelson-Burney, Scardelletti, and Rodriguez, as well as  
23 emails and Amtrak internally-generated documents concerning Amtrak's  
24 disciplinary procedures and Hill being subject to discipline.

25 ● *Failure to Reasonably Accommodate:* Hill required certain widely-utilized  
26 software programs (e.g. Excel) to be installed on her computer to allow her to

1 communicate effectively with her Supervisor, which Pitts was made aware of by  
2 Omanike. Amtrak unreasonably delayed the installation of this software.

3 These assertions of fact will be supported by the testimony of Hill, Pitts,  
4 and Omanike, as well as emails regarding the need for the software and installation  
5 related thereto.

6 ● *Failure to Reasonably Accommodate:* Hill required the ability to perform  
7 all her work from home, including attending training sessions and meetings  
8 regarding discipline. Amtrak refused to provide certain training at Hill's home and  
9 threatened to proceed with a mandatory disciplinary hearing occurring away from  
10 Hill's home.

11 These assertions of fact will be supported by the testimony of Hill, Pitts,  
12 Crozier, Omanike, Charlena Powell, Eisenberg, and Rodriguez, as well as  
13 emails and Amtrak internally-generated documents concerning Amtrak's  
14 disciplinary procedures and Hill being subject to discipline.

15 ● *Failure to Reasonably Accommodate:* Hill requested that accommodations  
16 which had already been granted remain in place, such as the ability to call  
17 off work without disciplinary repercussions for absences related to her  
18 disabilities. Amtrak informed Hill that certain accommodations she had  
19 were no longer in effect, and refused to honor such accommodations for an  
20 appreciable period of time.

21 These assertions of fact will be supported by the testimony of Hill, Pitts,  
22 Perkins, Omanike, Charlena Powell, Scardelletti, Nelson-Burney, and Rodriguez,  
23 as well as emails and Amtrak internally-generated documents concerning  
24 Hill's accommodations and need therefor.

25 ///

26 ///

1                   c)     **Claim 3: Failure to Engage in the Interactive Process in Violation**  
2                               **of FEHA.**

3           Hill will introduce the following categories of evidence establishing that Amtrak  
4 failed to timely engage in the good faith interactive process with Hill:

5           ●     Hill incorporates by reference and refers the Court to the portions of  
6 Sections II(A)(2)(a) that are entitled *Disability, Awareness of Disability, and Harm*  
7 as categories of evidence that establish those same elements of Hill's third cause  
8 of action for Failure to Engage in the Interactive Process in Violation  
9 of FEHA.

10          ●     Hill incorporates by reference and refers the Court to the portions of  
11 Sections II(A)(2)(b) that are entitled *Failure to Reasonably Accommodate*  
12 as categories of evidence that establish the element of Hill's requests for  
13 accommodations or Amtrak's awareness of Hill's need for accommodation re: Hill's  
14 third cause of action for Failure to Engage in the Interactive Process in Violation  
15 of FEHA.

16          ●     Hill incorporates by reference and refers the Court to the portions of  
17 Sections II(A)(2)(a) that are entitled *Adverse Employment Act and Substantial*  
18 *Motivating Reason* as categories of evidence to establish the elements of Hill's  
19 willingness to engage in the interactive process and Amtrak's failure to engage in  
20 the timely, good faith interactive process re: Hill's third cause of action for Failure  
21 to Engage in the Interactive Process in Violation of FEHA.

22                   d)     **Claim 4: Retaliation in Violation of FEHA.**

23           Hill will introduce the following categories of evidence establishing that Amtrak  
24 retaliated against Hill because she engaged in activity protected under FEHA:

25          ●     Hill incorporates by reference and refers the court to the portions of  
26 Sections II(A)(2)(a) that are entitled *Adverse Employment Action and Motivating*

1 *Reason* and *Harm* as categories of evidence that establish those same elements of  
2 Hill's fourth cause of action for Retaliation in Violation of FEHA.

3 ● Hill incorporates by reference and refers the Court to the portions of  
4 Sections II(A)(2)(b) that are entitled *Failure to Reasonably Accommodate*  
5 as categories of evidence that establish the element of Hill's protected activity re:  
6 Hill's fourth cause of action for Failure to Engage in the Interactive Process in  
7 Violation of FEHA.

8 ● *Protected Activity*: On November 14, 2011, Hill filed suit against Amtrak  
9 for failure to accommodate her disabilities due to Amtrak's refusal to allow Hill to  
10 work from home. The lawsuit was settled in April, 2013.

11 These assertions of fact will be supported by the testimony of Hill, Scardelletti,  
12 Nelson-Burney, and Rodriguez, as well as Hill's 2011 Complaint for Damages.

13 ● *Protected Activity*: Between April 24, 2013 and September 17, 2013, Hill  
14 made several complaints to Omanike and Pitts about Amtrak's failure to  
15 provide her with accommodations that had been previously provided to her.  
16 In addition, Scardelletti complained in writing to Amtrak CEO Boardman  
17 that Hill was not being properly accommodated and that she was being retaliated  
18 against.

19 These assertions of fact will be supported by the testimony of Hill, Pitts,  
20 Scardelletti, Nelson-Burney, Omanike, and Rodriguez, as well as emails, Amtrak's  
21 internal documents regarding Hill's accommodations and need therefor, and  
22 correspondence between Scardelletti, Boardman, and Burney.

23 **e) Claim 5: Wrongful Constructive Termination in Violation of**  
24 **Public Policy.**

25 Hill will introduce the following categories of evidence establishing that Amtrak  
26 constructively terminated Hill's employment:

1       ● Hill incorporates by reference and refers the court to all portions of  
2 Sections II(A)(2)(a), (b), (c), and (d) as categories of evidence that establish the  
3 elements of Amtrak violating public policy and Amtrak intentionally creating or  
4 knowingly permitting working conditions that were so intolerable that a reasonable  
5 person in Hill's position would have had no reasonable alternative except to resign  
6 re: Hill's fifth cause of action for Wrongful Termination in Violation of Public  
7 Policy.

8       ● Hill incorporates by reference and refers the court to the portions of  
9 Sections II(A)(2)(a) that are entitled *Harm* as categories of evidence that establish  
10 that same element of Hill's fifth cause of action for Wrongful Termination in  
11 Violation of Public Policy.

12               **f) Prayer for Relief – Compensatory damages.**

13 Hill will introduce the following categories of evidence establishing that Hill  
14 suffered compensatory damages:

15       ● Hill is entitled to past loss of earnings and benefits up through April 30, 2015  
16 in the amount of \$107,438.<sup>3</sup> Hill is entitled to future loss of earnings and benefits  
17 up through July 31, 2030 (age 67) in the amount of \$1,126,940.

18 These assertions of fact will be supported by the testimony of Hill and Tamarah  
19 Hunt, Ph.D., as well as by documents generated by Amtrak regarding Hill's salary  
20 and benefits.

21       ● Hill is also entitled to past and future mental suffering, loss of enjoyment of  
22 life, inconvenience, grief, anxiety, humiliation, and emotional distress according  
23 to proof at trial. Hill incorporates by reference and refers the court to the portions  
24 of Sections II(A)(2)(a) that are entitled *Harm* as categories of evidence that

25  
26 <sup>3</sup>Plaintiff's expert economist's report was generated on 4/30/2015. At trial, past loss of earnings  
will reflect an amount calculated up to the time of her testimony.



1 establish Hill suffered past mental suffering, loss of enjoyment of  
2 life, inconvenience, grief, anxiety, humiliation, and emotional distress, and will  
3 continue to suffer such damages in the future.

4 These assertions of fact will be supported by the testimony of Hill, Omanike,  
5 Rodriguez, Robertson, and Offenstein, as well as by emails, medical records, and  
6 journal entries.

7 **g) Prayer for Relief – Punitive damages.**

8 Hill will introduce the following categories of evidence establishing that Amtrak  
9 should be subject to punitive damages:

10 ● Hill incorporates by reference and refers the court to all portions of  
11 Sections II(A)(2)(a), (b), (c), and (d) as categories of evidence that Amtrak's  
12 unlawful treatment of Hill was done with malice, oppression, and fraud, and in  
13 conscious disregard for Hill's rights under FEHA.

14 ● The malicious, oppressive, and fraudulent acts committed against Hill were  
15 perpetrated and/or ratified by Pitts and Burney. Both Pitts and Burney were  
16 managing agents of Amtrak in that they each exercise substantial authority to  
17 interpret, influence, and/or create fundamental corporate policy.

18 These assertions of fact will be supported by the testimony of Hill, Omanike,  
19 Rodriguez, Pitts, Gerald Powell, Eisenberg, and Burney, as well as by emails and  
20 internal Amtrak documents discussing or reflecting the respective authority of  
21 Burney and Pitts.

22 **3. Amtrak's Affirmative Defenses [L.R. 16-4.1(d), (e), (f)]**

23 **a) First Affirmative Defense ("Failure to State Cause of Action"):**

24 Summary: Amtrak contends that Plaintiff's First Amended Complaint for  
25 Damages fails to state facts sufficient to constitute a claim upon which relief can be  
26 granted.

1        Elements: "Failure to State a Cause of Action" is not a proper affirmative  
2 defense, but, rather asserts a defect in Hill's prima facie case that is more properly brought  
3 by motion.

4        Source: *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp.  
5 2d 1167, 1174 (N.D. Cal. 2010).

6        Evidence in Opposition: Hill has asserted in her Complaint facts sufficient to  
7 constitute claims upon which relief can be granted for each cause of action pled. Hill has  
8 in fact successfully set forth in detail why such facts are sufficient in her Opposition to  
9 Defendant Amtrak's Motion for Summary Judgment, or in the alternative, Partial  
10 Summary Judgment. Amtrak has not made any other motion to assert any defects in Hill's  
11 First Amended Complaint.

12                    **b)        Second Affirmative Defense ("Failure to Mitigate"):**

13        Summary: Amtrak contends that Hill failed to "take reasonable steps to mitigate  
14 and/or avoid her damages."

15        Elements: Amtrak bears the burden of proving that: (1) substantially similar work  
16 was available to Hill; (2) that Hill failed to make reasonable efforts to seek such  
17 employment; and (3) the amount of earnings she would have earned had she made  
18 reasonable efforts to mitigate.

19        Source: CACI No. 2407.

20        Evidence in Opposition: It is Amtrak's burden of proof to establish that Hill failed  
21 to mitigate her damages. [*Parker v. 20th Century Fox Film Corp.* (1970) 3 Cal. 3d 176,  
22 181-82]. A general argument that the amount of future earnings claimed by Hill is too  
23 high, without more, is insufficient as a matter of law. [*Odima v. Westin Tucson Hotel*, 53  
24 F.3d 1484, 1495 (9th Cir.1995); *Malone v. Potter* (C.D. Cal., Jan. 15, 2010, CV 07-05530  
25 MMM FFMX) 2010 WL 330252; *Vitagraph v. Liberty Theaters Co. of Cal.*, 197 Cal. 694  
26 (1925): where the defendant produces *no* evidence on the issue of mitigation, the finding

1 must be against the defendant on that issue]. If Amtrak fails in its burden, then Hill must  
2 receive an award for all future earnings she reasonably establishes through her testimony  
3 and/or that of her expert economist. [*Id.* at 699-700; *Sias v. City Demonstration Agency*,  
4 588 F.2d 692, 696 (9th Cir.1978); *Malone v. Potter* (C.D. Cal., Jan. 15, 2010, CV 07-  
5 05530 MMM FFMX) 2010 WL 330252].

6 Amtrak has not proffered any evidence in its initial disclosures, expert disclosures,  
7 or formal discovery responses showing that substantially similar work was available to  
8 Hill at the time she was constructively terminated. Nor has Amtrak set forth in any  
9 fashion the amount of earnings Hill would have earned had she made reasonable efforts  
10 to mitigate. This defense therefore fails as a matter of law and should be dismissed by the  
11 Court before the jury is instructed.

12 **c) Third Affirmative Defense ("Avoidable Consequences"):**

13 Summary: Amtrak contends that Hill "unreasonably failed to take advantage on  
14 a timely basis of any preventative or corrective safeguards" provided by Amtrak or  
15 otherwise to avoid harm.

16 Elements: Amtrak is required to prove that: 1) it took all reasonable steps to prevent  
17 and correct discrimination and retaliation; 2) Plaintiff unreasonably failed to avail herself  
18 of these preventative procedures; and 3) had she done so, she could have avoid some of  
19 her harm.

20 Source: *Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026,  
21 1042.

22 Evidence in Opposition: Amtrak's defense will fail factually because: (1) Hill  
23 explained her need for accommodations and disabilities to her managers but was not  
24 properly accommodated; (2) Hill made numerous complaints to her managers about  
25 Amtrak's unlawful actions without any results; (3) The International President of Hill's  
26 Union, Robert Scardelletti made a complaint in writing to Amtrak's CEO alleging failure

1 to accommodate without any meaningful results; (4) Amtrak deviated from its own  
2 written policies in initiating disciplinary action against Hill; and (5) Amtrak was aware  
3 through Hill, as well as through observation, of Hill's need for accommodation but failed  
4 to timely initiate or engage in a meaningful, good faith interactive process.

5 **d) Fourth Affirmative Defense ("Estoppel"):**

6 Summary: Amtrak contends that Hill's claims are "bared in whole or in part by  
7 the equitable doctrine of estoppel."

8 Elements: Amtrak has the burden to establish the equitable defense of factual  
9 estoppel by proving that: 1) Hill has presented a factual position which is inconsistent  
10 with a factual position previously asserted by her, 2) that was reasonably relied upon by  
11 Amtrak, 3) to Amtrak's detriment.

12 Amtrak has the burden to establish the equitable defense of judicial estoppel by  
13 proving that Hill has presented a legal position which is inconsistent with a previously  
14 and successfully asserted legal position in a prior proceeding.

15 Source: *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S.  
16 51, 59 (1984) (citing Restatement (Second) of Torts § 894 (1979)); *New Hampshire v.*  
17 *Maine*, 532 U.S. 742, 121 S.Ct. 1808 (2001).

18 Evidence in Opposition: Amtrak cannot profer any evidence that Hill has presented  
19 any factual positions in this lawsuit that are inconsistent with any factual positions  
20 previously asserted by her. As such, this defense will fail factually.

21 Amtrak asserts that Hill is judicially estopped from asserting that she is a qualified  
22 person with a disability as of September 17, 2015 because she submitted an application  
23 for disability benefits with the Railroad Retirement Board. However, for the reasons  
24 briefed successfully by Plaintiff in her Opposition to Amtrak's Motion for Summary  
25 Judgment, Hill's positions are not inconsistent. Rather, the position asserted in this  
26 litigation is that Hill is able to work with accommodations after September 17, 2015,

1 while Hill's application to the Railroad Retirement Board asserts that Hill could not work  
2 for the next 12 months without accommodations. *Cleveland v. Policy Management*  
3 *Systems Corp.* (1999) 526 US 795, 803 (“...an ADA suit claiming that the plaintiff can  
4 perform her job with reasonable accommodation may well prove consistent with an SSDI  
5 claim that the plaintiff could not perform her own job (or other jobs) without it.” [at 803]  
6 [Emphasis in original]).

7 **e) Fifth Affirmative Defense (“Waiver”):**

8 Summary: Amtrak contends that Hill's claims are “barred in whole or in part by  
9 the equitable doctrine of waiver.”

10 Elements: Amtrak must establish by a preponderance of the evidence: (1) The  
11 intentional relinquishment by Hill of a known right with knowledge of its existence; and  
12 (2) Hill's intent to relinquish that right.

13 Source: *U.S. v. King Features Entm't, Inc.*, 843 F.2d 394, 399 (9th Cir. 1988).

14 Evidence in Opposition: Amtrak's waiver argument is based upon a Settlement  
15 Agreement and Release signed by Hill on April 30, 2013 to resolve her 2011 lawsuit  
16 against Amtrak. As briefed more extensively in Plaintiff's Opposition to Amtrak's  
17 Motion in Limine No. 1, the Settlement Agreement and Release signed by Hill on April  
18 30, 2013 was intended by the parties to release all claims related to Hill's prior lawsuit.  
19 The parties did not intend to release any claims for conduct arising out of Hill's return to  
20 work in April, 2013. In fact, the Agreement was a memorialization of a mediated  
21 settlement that was reached on April 16, 2013, before Hill returned to work. Furthermore,  
22 Hill was advised to sign the Agreement by her counsel, who was unaware at that time of  
23 Pitts's April 24, 2013 letter revoking Hill's existing accommodations. Hill's counsel never  
24 would have advised Hill to sign the Agreement if he were aware of Pitts's April 24, 2013  
25 letter. As such, by signing this Agreement Hill was not manifesting an intent to relinquish  
26

1 her rights to be free from unlawful conduct during the course of her 2013 employment,  
2 but rather only those rights which were the subject of her 2011 lawsuit.

3 **f) Sixth Affirmative Defense ("Unclean Hands"):**

4 Summary: Amtrak contends that Hill's claims are "bared in whole or in part by  
5 the equitable doctrine of unclean hands."

6 Elements: Amtrak must show by a preponderance of the evidence: (1) inequitable  
7 conduct by Hill; (2) that Hill's conduct directly relates to the claim(s) which it has  
8 asserted against Amtrak; and (3) that Hill's conduct injured Amtrak.

9 Source: *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d  
10 1197, 1223 (C.D. Cal. 2007) (citing *Survivor Productions LLC v. Fox Broad. Co.*, 2001  
11 WL 35829270, at \*3 (C.D. Cal. June 12, 2001)).

12 Evidence in Opposition: Hill incorporates by reference the evidence described in  
13 Section II(A)(2)(a), which shows that Hill has not engaged in any inequitable conduct.  
14 Thus, Hill is entitled to judgment as a matter of law on this defense.

15 **g) Seventh Affirmative Defense ("Punitive Damages Not Available"):**

16 Summary: Amtrak contends that Hill has failed "to allege facts sufficient to  
17 support an award of punitive damages as a matter of law."

18 Elements: Amtrak must prove that as a matter of law, none of its officers, directors,  
19 or managing agents 1) engaged in malice, oppression or fraud, or 2) authorized or ratified  
20 any malicious, oppressive, or fraudulent behavior.

21 Source: CACI No. 3945; Civ.C. § 3294(a), (b); *White v. Ultramar, Inc.* (1999) 21  
22 C4th 563, 577.

23 Evidence in Opposition: As a preliminary matter, punitive damages are recoverable  
24 for FEHA violations. *Yeager v. Corr. Corp. of Am.*, 944 F. Supp. 2d 913, 931 (E.D. Cal.  
25 2013); *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 220,  
26 221. As stated successfully by Plaintiff in her Opposition to Amtrak's Motion for

1 Summary Judgment, Amtrak, through its managing agents (Pitts and Burney) perpetrated  
2 and/or ratified malicious, oppressive, and fraudulent conduct directed at Hill, thus  
3 entitling Hill to punitive damages.

4 **h) Eighth Affirmative Defense ("Punitive Damages**  
5 **Unconstitutional"):**

6 Summary: Amtrak contends that an award of punitive damages would be an  
7 unconstitutional denial of its rights to Due Process and Equal Protection.

8 Elements: Amtrak has the burden of establishing that the U.S. Constitution and/or  
9 California Constitution forbids the imposition of punitive damages against defendant or  
10 that the amount of punitive damages assessed by the jury in this case violates Amtrak's  
11 rights to Due Process and Equal Protection.

12 Opposition: The U.S. Supreme Court has rejected any notion that punitive damages  
13 awards are inherently unconstitutional: The common law method of assessing punitive  
14 damages i.e., an initial determination by a jury instructed to consider the gravity of the  
15 wrong and the need to deter similar wrongful conduct, followed by trial and appellate  
16 court review for reasonableness "is not so inherently unfair as to deny due process and  
17 be per se unconstitutional." *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 US 1, 17;  
18 *BMW of No. America, Inc. v. Gore* (1996) 517 US 559, 568, 116; see *TXO Production*  
19 *Corp. v. Alliance Resources Corp.* (1993) 509 US 443, 458.

20 **i) Ninth Affirmative Defense ("Privilege and/or Justification"):**

21 Summary: Amtrak contends that its actions were "privileged and/or justified."

22 Opposition: Hill is unaware of any authority for the proposition that Privilege  
23 and/or Justification are viable affirmative defenses to any of her causes of action, or that  
24 Amtrak's unlawful behavior would be excused by any statutory privilege.

25 ///

26 ///

1                   j)     **Tenth Affirmative Defense (“Federal Employers' Liability Act**  
2                             **Preemption”):**

3             Summary: Amtrak's contends that Hill's claims are barred in whole or in part by  
4 the Federal Employers' Liability Act.

5             Elements: The Federal Employers' Liability Act (FELA, 45 USC § 51 et seq.)  
6 establishes a comprehensive mechanism for compensating railroad employees for injuries  
7 resulting from their employer's (railroad's) negligence. FELA has uniformly been found  
8 to constitute the exclusive remedy for such injuries occurring in the course and scope of  
9 employment. In order to establish this defense, Amtrak must prove that the conduct  
10 alleged was negligence which occurred in the course and scope of Hill's employment.

11             Source: *Nordgren v. Burlington Northern R.R. Co.* (8th Cir. 1996) 101 F3d 1246,  
12 1252.

13             Evidence in Opposition: Hill has alleged violations of FEHA and constructive  
14 termination based on public policy underlying FEHA. These are not negligence claims,  
15 but rather statutory discrimination claims. As such, this affirmative defense fails as a  
16 matter of law.

17                   k)     **Eleventh Affirmative Defense (“Statute of Limitations”):**

18             Summary: Amtrak contends that Hill's claims are barred in whole or in part by  
19 the applicable statute of limitations.

20             Elements: Amtrak must show by a preponderance of the evidence that: (1)  
21 Amtrak's alleged violations of FEHA occurred more than one year after she exhausted her  
22 administrative remedies with the DFEH; and/or 2) Hill's alleged wrongful constructive  
23 termination occurred more than two years prior to Hill filing suit.

24             Source: *Cal. Gov't. C.* § 12965(b); CCP § 335.1.  
25  
26



1        Evidence in Opposition: Hill seeks compensation for Amtrak's unlawful actions  
2 which occurred between April 24, 2013 and October 1, 2013.<sup>4</sup> Hill's constructive  
3 termination became effective on October 1, 2013. On February 20, 2014 Hill (through  
4 her attorney) exhausted her administrative remedies with the California Department of  
5 Fair Employment and Housing regarding events which occurred between April 24, 2013  
6 and October 1, 2013. On March 7, 2014, Hill filed her present lawsuit against Amtrak.  
7 As such, this defense fails factually and as a matter of law.

8                    **l) Twelfth Affirmative Defense ("Laches"):**

9        Summary: Amtrak contends that Hill's claims are "bared in whole or in part by  
10 the doctrine of laches."

11        Elements: Amtrak has the burden to establish that: (1) Hill delayed filing suit;  
12 (2) Hill's delay in filing suit was for an unreasonable period; and (3) Hill's unreasonable  
13 delay was prejudicial to Amtrak.

14        Source: *Johnson v. Crown Enterprises, Inc.* (5th Cir. 2005) 398 F3d 339, 344

15        Evidence in Opposition: Hill incorporates by reference the evidence described in  
16 Section II(A)(3)(k), which shows that Hill filed suit within the limitations period set by  
17 *Cal. Gov't. C. § 12965(b)* and *CCP § 335.1*, and in any event without any unreasonable  
18 delay or delay causing prejudice to Amtrak. Thus, Hill is entitled to judgment as a matter  
19 of law on this defense.

20                    **m) Thirteenth Affirmative Defense ("Failure to Exhaust  
21 Administrative Remedies"):**

22        Summary: Amtrak contends that Hill's claims are barred in whole or in part  
23 because she "failed to exhaust her administrative remedies."  
24

25        <sup>4</sup>Hill contends that events which occurred prior to April 24, 2013 are directly relevant to her  
26 claims. However, Hill seeks compensation only for wrongdoing that occurred between April 24, 2013  
through October 1, 2013.

1        Elements: Amtrak must establish by a preponderance of the evidence that Hill  
2 failed to file an administrative charge with the Department of Fair Employment and  
3 Housing within one year of the events or occurrences forming the bases for her FEHA  
4 causes of action.

5        Source: Cal. Gov't. C. § 12960(d).

6        Evidence in Opposition: On February 20, 2014 Hill (through her attorney)  
7 exhausted her administrative remedies with the California Department of Fair  
8 Employment and Housing regarding her allegations of discrimination, failure to  
9 reasonably accommodate, failure to engage in the interactive process, and retaliation  
10 related to events which occurred between April 24, 2013 and October 1, 2013.

11                    **n) Fourteenth Affirmative Defense ("Exceeds Scope of**  
12                    **Administrative Charge"):**

13        Summary: Amtrak contends that Hill's claims are barred in whole or in part to the  
14 extent her "allegations exceed the scope of any administrative charge she may have filed."

15        Elements: Amtrak must establish that Hill (through her attorney) failed to set  
16 forth the particular categories of unlawful conduct that form the basis of her lawsuit in  
17 her February 20, 2014 administrative charge.

18        Source: Cal. Gov't. C. § 12960(b).

19        Evidence in Opposition: In her February 20, 2014 administrative charge, Hill  
20 (through her attorney) sets forth allegations of discrimination, failure to reasonably  
21 accommodate, failure to engage in the interactive process, and retaliation related to events  
22 which occurred between April 24, 2013 and October 1, 2013.

23                    **o) Fifteenth Affirmative Defense ("Good Faith"):**

24        Summary: Amtrak contends that Hill's claims are bared in whole or in part by its  
25 "good faith and/or good faith legal defense."  
26

1        Opposition: "Good faith" is not a legally viable affirmative defense to any of Hill's  
2 causes of action. *Plaintiff* has the burden to prove that Amtrak acted with unlawful intent  
3 re: her first, fourth, and fifth causes of action. Amtrak's intent is irrelevant as to Hill's  
4 claims for failure to accommodate and failure to engage in the interactive process.  
5 *County of Fresno v. Fair Employment and Housing Commission* (1991) 226 Cal.App.3d  
6 1541, 1554 fn. 6; *Alexander v. Choate* (1985) 469 U.S. 287, 295.

7                    **p) Sixteenth Affirmative Defense ("Equitable Indemnity**  
8                    **/Proportional Fault"):**

9        Summary: Amtrak contends that its liability should be reduced by any percentage  
10 of fault attributable to Hill or third party individuals.

11        Elements: Amtrak must prove by a preponderance of evidence that Hill's harm was  
12 attributable to Hill's actions or inactions or those of third parties.

13        Source: *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 810

14        Evidence in Opposition: As set forth in Sections II(A)(1)(a) and (d) hereinabove,  
15 Hill's harm was caused entirely by Amtrak's unlawful conduct, and neither Hill nor any  
16 third parties contributed to causing any harm claimed by Hill.

17                    **q) Seventeenth Affirmative Defense ("Release"):**

18        Summary: Amtrak contends that Hill's claims are bared in whole or in part  
19 because Hill has "entered into a valid and enforceable release of claims."

20        Elements: Hill refers the Court to section 2(A)(3)(e) of this Memorandum  
21 discussing Amtrak's "Waiver" affirmative defense.

22        Source: Hill refers the Court to section 2(A)(3)(e) of this Memorandum discussing  
23 Amtrak's "Waiver" affirmative defense.

24        Evidence in Opposition: Hill refers the Court to section 2(A)(3)(e) of this  
25 Memorandum discussing Amtrak's "Waiver" affirmative defense.

1                   r)     **Eighteenth Affirmative Defense (“Undue Hardship/Requested**  
2                                   **Accommodation Unreasonable”):**

3           Summary: Amtrak contends that the accommodations Hill sought were  
4 unreasonable or would have imposed an undue hardship on Amtrak.

5           Elements: The contention that Hill's accommodation requests were unreasonable  
6 is not a proper affirmative defense, but, rather invokes an element of Hill's prima facie  
7 case.

8           To establish the affirmative defense of "undue hardship," Amtrak has the burden  
9 of proving that the proposed accommodations would be significantly difficult or  
10 expensive to make, taking into consideration the following factors: 1) The nature and  
11 cost of the accommodation; 2) Amtrak's ability to pay for the accommodation; 3) The type  
12 of operations conducted at the facility; 4) The impact on the operations of the facility; 5)  
13 The number of Amtrak's employees and the relationship of the employees' duties to one  
14 another; and 6) The number, type, and location of Amtrak's 's facilities (e.g. The  
15 administrative and financial relationship of the facilities to one another).

16           Source: CACI 2545.

17           Evidence in Opposition: This affirmative defense will fail factually because: 1)  
18 Amtrak has failed to proffer any evidence indicating that the nature or cost of permitting  
19 Hill to work from home, providing Hill with further training, providing Hill with adequate  
20 computer software, modifying its attendance policy or enforcement thereof, or terminating  
21 its disciplinary proceedings would constitute an undue hardship to its operations; 2)  
22 Amtrak has failed to proffer any evidence regarding its ability to pay for the  
23 accommodations Hill required; and 3) Amtrak has failed to proffer any evidence  
24 indicating that permitting Hill to work from home, providing Hill with further training,  
25 providing Hill with adequate computer software, modifying its attendance policy or  
26

1 enforcement thereof, or terminating its disciplinary proceedings would significantly  
2 adversely impact Amtrak's business operations.

3           **s) Nineteenth Affirmative Defense ("Plaintiff Failed to Engage in**  
4           **Interactive Process"):**

5       Summary: Amtrak contends that Hill failed to engage in the interactive process.

6       Opposition: This is not a proper affirmative defense, as *Plaintiff* has the burden to  
7 prove that she was willing to participate in an interactive process to determine whether  
8 reasonable accommodation could be made so that she would be able to perform the  
9 essential job requirements. In any event, as explained in Sections 2(A)(2)(a)-(c)  
10 hereinabove, Amtrak, not Hill, was responsible for the breakdown of the interactive  
11 process.

12           **t) Twentieth Affirmative Defense ("Job-Related/Business**  
13           **Necessity"):**

14       Summary: Amtrak contends that Hill's claims are bared in whole or in part  
15 because "its actions were job related and/or justified by business necessity."

16       Opposition: The business necessity defense applies only in disparate impact cases.  
17 Hill does not allege disparate impact. *Union, United Auto., Aerospace & Agr. Implement*  
18 *Workers of America, UAW v. Johnson Controls, Inc.*, (1991) 499 US 187, 197.

19           **u) Twenty-First Affirmative Defense ("RLA Preemption"):**

20       Summary: Amtrak contends that Hill's claims are bared in whole or in part by the  
21 Railway Labor Act.

22       Elements: To prevail on this defense, Amtrak must prove that resolution of Hill's  
23 state law claims requires interpretation or application of a collective bargaining  
24 agreement.

25       Source: *Hawaiian Airlines, Inc. v. Norris* (1994) 512 US 246, 261; see *Thomas v.*  
26 *Union Pac. R.R. Co.* (8th Cir. 2002) 308 F3d 891, 893- claim must be "inextricably

1 intertwined with consideration of a collective bargaining agreement" (mere reference to  
2 collective bargaining agreement insufficient); *Burnside v. Kiewit Pac. Corp.* (9th Cir.  
3 2007) 491 F3d 1053, 1060- referring to CBA to ascertain bargained-for wage rate does  
4 not warrant preemption; *Gregory v. SCIE, LLC* (9th Cir. 2003) 317 F3d 1050, 1052-  
5 simply consulting CBA does not require preemption if meaning of contract term not in  
6 dispute.

7 Evidence in Opposition: The resolution of Hill's claims does not involve the  
8 interpretation or application of a collective bargaining agreement. Therefore, this  
9 affirmative defense fails as a matter of law.

10 **v) Twenty-Second Affirmative Defense ("After-Acquired**  
11 **Evidence"):**

12 Summary: Amtrak has the burden of establishing the equitable defense of after-  
13 acquired evidence by establishing that: 1) Amtrak discovered after Hil's separation from  
14 employment that Hill had committed wrongdoing; and 2) Hill's wrongdoing was of such  
15 severity that she in fact would have been terminated by Amtrak on those grounds alone  
16 as a matter of settled company policy if Amtrak had known of the wrongdoing at the time  
17 of discharge.

18 Source: *McKennon v. Nashville Banner Pub. Co.* (1995) 513 U.S. 352, 362-363;  
19 *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal.App.4th 833, 847.

20 Evidence in Opposition: This defense will fail factually because Amtrak has not  
21 offered any proof of the existence of any after-acquired evidence regarding Hill in its  
22 Initial Disclosures or through discovery. In fact, several Amtrak employees testified in  
23 deposition that they are unaware of any after-acquired evidence regarding Hill.

24 **w) Twenty-Third Affirmative Defense ("Additional Defenses"):**

25 Summary: Amtrak has reserved the right to assert additional affirmative defenses.

1        Opposition: Amtrak has not sought leave of court to amend its Answer to plead  
2 additional affirmative defenses. At this late stage, any attempt by Amtrak to do so would  
3 result in undue prejudice to Hill, as discovery is cut off and trial is scheduled to  
4 commence on October 6, 2015.

5        **4. Anticipated Evidentiary Issues [L.R. 16-4.1(h)]**

6        Beyond those evidentiary issues articulated and briefed in the respective parties'  
7 Motions *in Limine*, two related evidentiary issue remains:

8        Issue 1: Is Diane Pitts a "managing agent" of Amtrak, thus permitting Hill to  
9 present her video deposition testimony to the jury pursuant to Fed. R. Civ. P. 32(a)(3)?

10        Hill's Position: Pitts a "managing agent" of Amtrak. Pitts was the Operations  
11 Manager at Amtrak's Riverside Call Center, one of only two Call Centers within Amtrak.  
12 In her role, Pitts formulated *ad hoc* corporate policy by determining when employee  
13 offenses would result in the initiating of disciplinary proceedings, and how the Call  
14 Center would deviate from Amtrak's corporate policies in that regard. Pitts authority  
15 extended over all agreement covered employees in the Riverside Call Center. *White v.*  
16 *Ultramar, Inc.* (1999) 21 Cal. 4th 563, 571.

17        Issue 2: Is Denyse Nelson-Burney a "managing agent" of Amtrak, thus  
18 permitting Hill to present her video deposition testimony to the jury pursuant to Fed. R.  
19 Civ. P. 32(a)(3)?

20        Hill's Position: Burney is a "managing agent" of Amtrak, in that she regularly  
21 exercised substantial discretionary authority over decisions that ultimately determine  
22 corporate policy. Burney was responsible for advising all Amtrak managers nationwide  
23 regarding how to interpret and apply Amtrak's labor and employment related policies and  
24 State and Federal law related thereto. Burney also served on Amtrak's ADA committee,  
25 which determined whether employees nationwide who required accommodations would  
26 receive those accommodations, and if an interactive process would be undertaken with

1 those employees. Burney also was responsible for overseeing the direction of Amtrak's  
2 labor and employment active litigation. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563,  
3 571.

4 **5. Identification of Issues of Law [L.R. 16-4.1(i)]**

5 Other than the issues raised by Amtrak's pending Motion for Summary Judgment  
6 and Motions in Limine,<sup>5</sup> there remains an issue of law:

7 Issue: If an employer otherwise becomes aware of the need for an accommodation  
8 through a third party or by observation, is the employer's duty to engage in the interactive  
9 process triggered?

10 Hill's Position: If an employer otherwise becomes aware of the need for an  
11 accommodation through a third party or by observation, the employer's duty to engage in  
12 the interactive process is triggered as a matter of law.

13 Authority: Cal. Code Regs. tit. 2, § 11069.9(b)(2) states, relevant part:

14 "(b) Notice. An employer or other covered entity shall initiate an interactive  
15 process when:

16 [. . .]

17 (2) the employer or other covered entity otherwise becomes aware of the  
18 need for an accommodation through a third party or by observation,

19 [. . .]."

20 *Also see Prilliman v. United Airlines, Inc.* (1997) 53 Cal.App.4th 935, 954.

21 ///

22 ///

23 ///

24 ///

25  
26 <sup>5</sup>Hill has submitted detailed oppositions to Amtrak's motions setting forth her position regarding  
the disputes of law raised by Amtrak therein.



1           **III. BIFURCATION OF ISSUES [L.R. 16-4.3]**

2           **A. Punitive Damages**

3           Hill requests that the trial be bifurcated into two phases. Phase One would try  
4 issues of liability of Defendant and compensatory damages; Phase Two would try the  
5 amount of punitive damages to be assessed against Defendant.

6           **B. Amtrak's After-Acquired Evidence Defense**

7           Amtrak's equitable defense of after-acquired evidence is to be decided by the  
8 Court. *McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 361-362.  
9 As this equitable defense only come into play after Plaintiff proves liability, the Court  
10 should bifurcate this issue and hold a post-verdict hearing to address it.

11          **IV. JURY TRIAL [L.R. 16-4.4]**

12          **A. Issues Triable to the Jury**

13          Hill has made a timely demand for jury trial. The following issues are triable to a  
14 jury:

- 15          1. Is Hill disabled under FEHA?
- 16          2. Is Hill a qualified individual under FEHA?
- 17          3. Did Amtrak fail to reasonably accommodate Hill's disabilities?
- 18          4. Did Amtrak fail to engage in the good faith, interactive process with Hill?
- 19          5. Did Amtrak discriminate against Hill because of her disability?
- 20          6. Did Amtrak retaliate against Hill because she engaged in activity protected  
21 by FEHA?
- 22          7. Did Amtrak constructively terminate Hill's employment in violation of  
23 public policy?
- 24          8. Did Amtrak's unlawful actions cause Hill harm?
- 25          9. What is the monetary amount of compensatory damages to which Hill is  
26 entitled?

- 1        10. Did any officer, director, or managing agent of Amtrak engage in malice,  
2        oppression, or fraud towards Hill?
- 3        11. Did any officer, director, or managing agent ratify any conduct towards Hill  
4        that was malicious, oppressive, or fraudulent?
- 5        12. What is the monetary amount of punitive damages that should be assessed  
6        to Amtrak?
- 7        13. Amtrak's Second, Third, Ninth, Sixteenth, Seventeenth, Eighteenth,  
8        Nineteenth, and Twentieth Affirmative Defenses.<sup>6</sup>

9        Authority: Ninth Circuit Manual of Model Jury Instructions (2007 ed.), Instruction  
10       Nos. 1.2, 1.3; CACI Nos. 2432, 2433, 2505, 2540, 2541, 2542 (modified), 3900, 3902,  
11       3903, 3903C, 3905, 3905A, and 3945.

12                    **B. Issues Triable to the Court**

13        The following issues as triable to the Court:

- 14        1. Amtrak's equitable affirmative defenses: Fourth Affirmative  
15        Defense("Estoppel"); Fifth Affirmative Defense ("Waiver"); Sixth Affirmative Defense  
16        ("Unclean Hands"); Twelfth Affirmative Defense ("Latches"); and Twenty-Second  
17        Affirmative Defense (After Acquired Evidence").

18        Authority: *See generally Granite State Ins. Co. v. Smart Modular Techs., Inc.*, 76  
19        F.3d 1023, 1027 (9th Cir. 1996) ("A litigant is not entitled to have a jury resolve a  
20        disputed affirmative defense if the defense is equitable in nature."); *Danjaq LLC v. Sony*  
21        *Corp.*, 263 F.3d 942, 962 (9th Cir. 2001) ("there is no right to a jury on the equitable  
22        defense of laches"); *U.S. v. Kaczynski*, 551 F.3d 1120, 1129 (9th Cir. 2009) ("The  
23        doctrine of unclean hands is an equitable doctrine..."); *Westinghouse Elect. v. Gen.*

24

25        <sup>6</sup>Hill contends that many of these affirmative defenses will ultimately fail as a matter of law at  
26        trial. Hill therefore reserves the right to bring the appropriate motion to dispose of these defenses before  
      the jury is instructed.

1 *Circuit Breaker*, 106 F.3d 894, 899 (9th Cir. 1997) (acquiescence is an “equitable  
2 defense[]”).

3           2.     Amtrak’s Constitutional and Preemption affirmative defenses: Eighth  
4 Affirmative Defense (“Punitive Damages Unconstitutional”); Tenth Affirmative Defense  
5 (“Federal Employers’ Liability Act Preemption”); and Twenty-First Defense (“RLA  
6 Preemption”).

7           Authority: *See Fishermen Against the Destruction of the Environment, Inc. v.*  
8 *Closter Farms, Inc.*(11th Cir. 2002) 300 F.3d 1294, 1296; also *see City of Auburn v.*  
9 *Qwest Corp.*, 260 F.3d 1160, 1172 (9th Cir.2001).

10           3.     The amount of prejudgment interest to which Hill is entitled.

11           Authority: *Cal. Civ. C. § 3287.*

12           **V.     ATTORNEYS’ FEES [L.R. 16-4.5]**

13           Should Hill prevail on any of her claims under the California Fair Employment and  
14 Housing Act, she is entitled to her attorneys’ fees and costs (including expert witness  
15 fees) under *Cal. Gov’t. C. § 12965(b)*. A prevailing FEHA plaintiff should ordinarily  
16 recover attorney fees, unless special circumstances would render the award unjust.  
17 *Christiansburg Garment Co. v. EEOC* (1978) 434 US 412, 416–417, 98 S.Ct. 694,  
18 697–698 (Title VII case); *Chavez v. City of Los Angeles* (2010) 47 C4th 970, 985, 104  
19 CR3d 710, 721 (adopting *Christiansburg* rule for fee awards under FEHA); *see Horsford*  
20 *v. Board of Trustees of Calif. State Univ.* (2005) 132 CA4th 359, 394, 33 CR3d 644, 671.

21           **VI.    ABANDONMENT OF ISSUES [L.R. 16-4.6]**

22           Hill does not abandon any issues for trial. Defendant has not indicated to Plaintiff  
23 that it intends to abandon any issues for trial.

24           Dated: August 31, 2015

BROWN & LIPINSKY LLP  
ATTORNEYS AT LAW

DAREN H. LIPINSKY  
Attorney for Plaintiff, SIMONE HILL

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA )  
3 UNITED STATES DISTRICT COURT ) ss.

4 I am a resident of the State of California, County of San Bernardino. I am over the  
5 age of eighteen years and not a party to the within action. My business address is 5811  
Pine Avenue, Suite A, Chino Hills, California 91709.

6 On August 31, 2015, I served on the interested parties in this action the within  
7 document(s) entitled:

8 **PLAINTIFF'S MEMORANDUM OF CONTENTIONS OF LAW AND FACT**

9 [ ] **(BY U.S. MAIL)** I enclosed the documents in a sealed envelope or package  
10 addressed to the person(s) at the addresses listed below and I deposited the sealed  
envelope or package with the U.S. Postal Service, with the postage fully prepaid.

11 [X] **(BY COURT'S CM/ECF SYSTEM)** Pursuant to Local Rule, I electronically  
12 filed the documents with the Clerk of the Court using the CM/ECF system, which  
sent notification of that filing to the person(s) listed below.

13 [ ] **BY FAX: (C.C.P. § 1013(a), (e); CRC 2008)** - by transmitting via electronic  
14 facsimile the document(s) listed above to the fax number(s) set forth below on this  
date before 5:00 p.m.; I also caused the fax machine to print such record(s) of the  
transmission.

15 [ ] **BY OVERNIGHT MAIL (C.C.P. § 1013(c))** - By **FEDERAL EXPRESS**,  
16 following ordinary business practices for collection and processing of  
correspondence with said overnight mail service, and said envelope(s) will be  
17 deposited with said overnight mail service on said date in the ordinary course of  
business.

18 [ ] **BY PERSONAL SERVICE** - I personally delivered such envelope to the offices  
19 of the addressee.

20 [ ] **BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED** - By placing true  
21 copy(ies) thereof in sealed envelope(s) with Certified Mail, Return Receipt  
Requested, postage thereon fully prepaid and by causing such envelope(s) to be  
22 deposited in the mail at 5811 Pine Avenue, Suite A, Chino Hills, California  
91709.

23 [ ] **BY ELECTRONIC SERVICE (C.C.P. § 1010.6(a)(6))** - the parties listed below  
24 were served electronically with the document(s) listed above by e-mailed PDF  
files. The transmission was reported as complete and without error. My  
25 electronic notification address is 5811 Pine Avenue, Suite A, Chino Hills,  
California 91709. My e-mail address is mes.brownlipinsky@gmail.com.

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☐ **STATE:** I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

☒ **FEDERAL:** I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 31, 2015, at Chino Hills, California.

  
MARY ELLEN SAMBRANO